(16)

No. 89-1905

In The
Supreme Court of the United States
October Term, 1990

WISCONSIN PUBLIC INTERVENOR
and TOWN OF CASEY,

Petitioners,

v.

RALPH MORTIER, et al.

Respondents.

On Writ of Certiorari To The Supreme Court of Wisconsin

BRIEF OF *AMICUS CURIAE* GREEN INDUSTRY COUNCIL IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Does the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. §136 *et seq.*, preempt the regulation of pesticide use by local units of government?

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INTEREST OF AMICUS

The Green Industry Council ("GIC") is a not-for-profit business organization representing the interests of the New England green industry: interior and exterior landscape design, contracting and management firms; arborists; nurserymen; and turf managers. GIC is an organization of twelve business organizations: its members include such groups as the Irrigation Association of New England, the Massachusetts Association of Lawn Care Professionals, the Associated Landscape Contractors of Mass., the Mass. Arborists Association, the Golf Course Superintendents' Association of New England, and the Mass. Nurserymen's Association. The Council represents the common interests of the member firms of these organizations before legislatures and regulatory agencies and in court. GIC addresses such issues as responsible integrated pest management; professional certification and licensure; water conservation; protecting endangered species; and recycling and composting. The Council supports educational and research programs and promotes the adoption of new techniques and products which ensure the public safety and protection of the environment.

Many of the firms which are members of these business organizations use pesticides in hundreds of cities and towns in New England. These firms are committed to enhancing and caring for our landscape and environment. They use pesticides only as necessary and as part of integrated pest management programs which comply with all federal and state laws. However, if these member firms were faced with hundreds of inconsistent ordinances adopted by local governments with little or no access to technical expertise concerning pesticides, it will become impossible for them to operate in many localities. The Council and its members are also concerned that if the decision below is reversed, ignorant and inconsistent local requirements will result in damage to the environment by preventing the use of new and safer integrated control measures. Therefore, the Green Industry Council seeks to draw to this Court's attention some of the adverse effects such

ordinances could have in the real world, effects that Congress not only did not intend when it adopted FIFRA, but which the Council believes it intended to prevent by preempting local regulation of pesticide use.

The parties have each filed with the Court Clerk general consents to the filing of amicus briefs. Therefore, Amicus Green Industry Council has the consent of the parties to the filing of this brief.

SUMMARY OF ARGUMENT

Local regulation of pesticide use is impliedly and expressly preempted by FIFRA. Some of the confusion encountered by the lower courts on this issue can be clarified by reversing the usual order of preemption analysis and examining implied preemption first. In FIFRA Congress constructed a sweeping, comprehensive statutory scheme which assigns to the states specific regulatory roles within that federal scheme. Congress deliberately assigned no role to local governments because it concluded that local regulation would lack necessary technical expertise and would interfere with interstate commerce. These concerns were realistic. Inept and inconsistent local regulation can have the unintended effect of damaging the environment rather than protecting it further.

In the interests of federalism and as the result of painstaking and prolonged negotiations among contending interest groups, Congress included express statutory language in FIFRA that assigns a limited role for the states. FIFRA is precisely the sort of federal regulatory program which occupies the field to the exclusion of all state or local regulation which Congress has not expressly exempted from preemption.

This comprehensive federal background accounts for the peculiar phrasing of the express preemption clause, 7 U.S.C. §136v, which primarily speaks of what the states are authorized to do in this field, rather than what they are preempted from doing. Congress structured the state role in this fashion to strike a balance among competing concerns of pesticide regulation, environmental

protection and federalism. Thus, in the field of pesticide regulation, the states are restricted to the role which Congress assigned to them in the statutory script. In light of the structure and logic of FIFRA, because no express statutory language saves local regulation from preemption, such regulations are preempted.

Preemption of local regulation was not accidental. Congress considered and rejected inclusion in FIFRA of statutory language which would have exempted local as well state regulation of pesticide use. When in crafting a statute Congress knowingly rejects language which would expressly accomplish a certain result, the statute as adopted should not be judicially construed to accomplish that very result. In FIFRA Congress deliberately rejected local regulation of pesticide use because it felt that localities would generally lack the ability to make the detailed technical evaluations of the environmental and economic costs and benefits of pesticides which are the centerpiece of the complex FIFRA regulatory scheme. Absent such expertise, local regulation of pesticide use can actually harm the environment, as well as interfere with interstate commerce.

ARGUMENT

I. IMPLIED PREEMPTION

Amicus Green Industry Council agrees with the Respondents' arguments that FIFRA preempts local regulations of pesticide use. In this brief, however, the Council will employ an alternative approach that reaches the same result by looking first at implied preemption and then at express preemption.

The courts which have looked at this issue have divided primarily over the question of whether in light of the statutory language and structure, and legislative history of FIFRA, the lack of a explicit statement in the statute that "local regulations are preempted" or "that local regulations are not preempted" is to be construed as supporting or rejecting preemption. The split in the courts which have considered that issue demonstrates that the

crucial analytical question is what is the default assumption.[1]

A. *The Standard of Implied Preemption*

Congress may indicate an implied intent to occupy a regulatory field, thereby displacing all state and local laws on the same subject. In determining whether such implied preemption exists, the Court looks to the structure, purpose and legislative history of the federal statute. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 95 (1983); *Hines v. Davidowitz*, 312 U.S. 52, 78, 79 (1941). This review may reveal a number of different, alternative indications of an implied congressional intent to supersede state and local law.

For instance, the requisite intent has been found where the federal regulatory scheme is so pervasive as to lead to the reasonable inference that Congress left no room for the states to supplement it other than by fulfilling whatever role, if any, the federal statute itself provides for state law. *Fidelity Federal Savings & Loan v. De La Cuesta*, 458 U.S. 141, 153 (1982). In

[1] The courts which have held that FIFRA preempts local pesticide use regulations have concluded that FIFRA's legislative history and/or structure demonstrate that Congress intended it to preempt state and local regulations except insofar as Congress specifically authorized such regulation. *Professional Lawn Care Ass'n v. Village of Milford*, 909 F.2d 929, 931, 933-934 (6th Cir. 1990), petition for cert. pending, No. 90-382; *Maryland Pest Control Ass'n v. Montgomery County*, 822 F.2d 55 (4th Cir. 1987) (Table) summarily aff'g 646 F. Supp. 109, 110 (D. Md. 1986); see also *Maryland Pest Control Ass'n v. Montgomery County*, 884 F. 2d 160, 161-162 (4th Cir. 1989) (noting in attorney's fee litigation that it had previously affirmed district court holding that local pesticide ordinances "were invalid under FIFRA"), cert. denied, 110 S.Ct. 1524 (1990). On the other hand, the courts which have held that FIFRA does not preempt local regulations have relied on the principle that local health and safety regulations are not preempted unless Congress has made its intent to do so extremely clear. *People ex rel. Deukmejian v. County of Mendocino*, 36 Cal. 3d 476, 683 P.2d 1150, 1160, 204 Cal. Rptr. 897 (1984); *Central Maine Power Co. v. Town of Lebanon*, 571 A.2d 1189, 1192 (Me. 1990); *Coparr Ltd v. City of Boulder*, 735 F. Supp. 363, 367 (D. Colo. 1989), app. pending, No. 89-1341 (10th Cir.) (argued Jan. 15, 1991).

addition, implied preemption will be found where the object Congress seeks to obtain by federal law and the character of the obligations imposed by it reveal the same preemptive purpose. *Id.* A Congressional intent to establish a uniform regulatory scheme in a statute, as "implicitly contained in its structure and purpose," also demonstrates a Congressional intent to occupy a field. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). "[T]he failure of a federal statute to speak directly to preemption does not necessarily create a gap for state or local regulation." *Professional Lawn Care Ass'n v. Village of Milford*, 909 F.2d at 932 (*citing Adams Fruit Co. v. Barrett*, --- U.S. ---, 110 S.Ct. 1384, 1391, 108 L. Ed. 2d 585, 594 (1990)). In any of these situations, preemption will be found even when state or local regulation merely supplements and does not conflict with the federal statute. *Campbell v. Hussey*, 368 U.S. 297, 302 (1961).

B. *FIFRA is a Comprehensive Regulatory Scheme Which Restricts States to Federally Defined Roles.*

The statutory structure of FIFRA, its comprehensive scope together with the carefully crafted role that it gives to the states and its concern with statewide uniformity of pesticide regulation, demonstrates that Congress intended to preclude local regulation of pesticides.

The "intent behind the 1972 amendments [to FIFRA] was to enact sweeping federal pesticide regulation," *Professional Lawn Care Ass'n*, 909 F.2d at 933, and "to change FIFRA from a labelling law into a comprehensive regulatory statute that will henceforth more carefully control the manufacture, distribution and use of pesticides." H.R. Rep. No. 511, 92d Cong., 1st Sess. at 1 (1971). *Accord, Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984).

This broad intent is confirmed by analysis of FIFRA's provisions. Under FIFRA, EPA must register all pesticides before they can enter commerce. 7 U.S.C. §136a(a). Information on labeling, testing, chemical formulae, proposed use, and other

relevant items must be filed with EPA to obtain registration. 7 U.S.C. §136a(c).

Congress wrote into FIFRA a carefully defined role for the states. This role is the result of a balance struck in Congress among competing interest groups and points of view in the course of the two years of negotiations that led to the final Act. *See* discussion of the legislative history in the opinion of the Wisconsin Supreme Court, below, *Mortier v. Wisconsin Public Intervenor*, 154 Wis. 2d 18, 452 N.W. 2d 555, 558-61 (1990); and in the concurring opinion of Nelson, J., in *Professional Lawn Care Ass'n*, 909 F.2d at 937-940. In particular, Congress was concerned that the EPA and the states work together to secure "uniformity of regulations" on a statewide level. 7 U.S.C. §136t(b).[2] This provision manifests a clear congressional intent that EPA monitor the uniform regulation of pesticides, an intent that would be frustrated by the "muddle of thousands of local standards and regulations." *Professional Lawn Care*, 909 F.2d at 934. *See* S. Rep. No. 838, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 3993, at 4008, 4013 (report of the Sen. Comm. on Agriculture and Forestry, hereinafter "S. Rep. 838"). Congress' choice of state level uniformity for pesticide use regulations was a compromise between having a single national standard as Congress required for pesticide labeling, §136v(b), and an approach of letting every municipality in the country set its own standards, as some in Congress and some interest groups would have preferred, *see* S. Rep. No. 970, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS at 4111.

Congress accomplished this compromise by writing a script in which EPA directs the state actors in their federally assigned roles. FIFRA requires EPA approval of state applicator certification plans, 7 U.S.C. §136i, and enforcement plans, §136u. EPA "may enter into cooperative agreements with States" by which EPA will

[2] "The Administrator shall cooperate with . . . any appropriate agency of any State or political subdivision thereof, in carrying out the provisions of this Act and in securing uniformity of regulations." §136t(b).

"delegate" to a state "authority to cooperate in the enforcement" of FIFRA. 7 U.S.C. §136u(a). Similarly, Congress assigned to each states "primary enforcement responsibility for pesticide use violations," but only if EPA determines that the state "has adopted adequate pesticide use laws" and procedures and will keep required records and make reports to EPA demonstrating that it is playing its role adequately. §136w-1(a). EPA can revoke its delegated authority and take over enforcement of pesticide use requirements if a state does not live up to its plan. §136w-2(b). If a state does not have an EPA-approved plan to use authority delegated by EPA, then EPA itself "shall have primary enforcement responsibility" over pesticide use. §136w-1(c). Similarly, if a state certification plan does not meet EPA standards, EPA itself will revoke the state's authority and take over direct administration. §136i(b). EPA has promulgated detailed rules outlining the criteria for its approval of state plans. 40 C.F.R. §§171.3, 171.7. In each of these contexts, the term "State" makes sense only if it is read as meaning each of the fifty states (and District of Columbia and outlying territories, 7 U.S.C. §136(aa)) rather than the tens of thousands of local subdividisions such as the Town of Casey, which might wish to enact their own pesticides codes.

It is important to note that FIFRA speaks in terms of EPA "*delegating*" authority over pesticide use regulation to the states. If the states could adopt such regulations on their own sovereign authority, it would make no sense to talk of EPA delegating authority. However, the statutory language does makes sense if Congress in FIFRA intended to preempt nonfederal authority and then grant back to the states a limited delegation of federal authority under the terms and conditions of FIFRA.

FIFRA is no less comprehensive because it does not impose every conceivable limitation on pesticide use. Some, like the Petitioners here, do not believe that it goes far enough in restricting pesticides. But FIFRA is the result of a compromise between the viewpoint of persons like the Petitioners and other persons who believe that less regulation is appropriate for both the economy and the environment. This balance is reflected in FIFRA's language

and in its legislative history. Congress considered and rejected the goal of "complete" protection because such protection ignored the benefits of pesticide use. H.R. Rep. No. 511, at 5, 14; S. Rep. No. 838 at 3996-97. As the Senate Committee on Agriculture and Forestry commented, "appropriate pesticides properly used are essential to man and his environment. . . ." *Id.* at 3996.

Thus FIFRA is as comprehensive as it can be, consistent with Congress' intent to balance the risks of pesticide use against their benefits. It creates a regulatory scheme that governs the production, sale, distribution, storage, transportation, handling, use, application and disposal of pesticides. It represents a Congressional decision to concentrate authority on the federal level and administration on the federal and state levels. Except insofar as Congress has provided the limited exemption from preemption set out in 7 U.S.C. §136v, states and local governments are excluded from regulating pesticides. Because there is no explicit exemption from preemption for local ordinances in FIFRA they are preempted.

II. EXPRESS PREEMPTION

A. *The Phrasing of 7 U.S.C. §136v Shows that it Exempts from Preemption Only a Limited State Regulatory Role.*

The above argument for implied preemption of local authority is supported by the phrasing of §136v, titled "Authority of States." That section is not so much a preemption provision as it is an exemption from preemption provision. Section 136v begins by stating positively what a state "may" do concerning pesticide use regulation rather than starting with a prohibition: "A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent that the regulation does not permit any sale or use prohibited by this Act." §136v(a). If, as Petitioners suggest, the default assumption is that states and local governments can regulate as they please absent a specific federal prohibition, Congress' statement of the authority of states would have begun with a list of the prohibitions it believed

necessary to impose. However, once it is understood that Congress intended FIFRA to occupy the field and intended that the states shall have only such authority over pesticide use as Congress gives back to them, the phrasing of §136v(a) makes perfect sense.

Similarly it makes sense that Congress followed through with this state-level approach by authorizing states (but not localities) to "provide registration for pesticides formulated for distribution and use within that State to meet special local needs if that State is certified by the Administrator as capable of exercising adequate controls to assure that such registration will be in accord with the purposes of the Act and if registration for such use has not previously been denied, disapproved, or canceled by the Administrator." 7 U.S.C. §136v(c). Thus, FIFRA makes explicit provision for state attention to local needs in pesticide regulation and provides how that attention may be expressed.

As the Wisconsin Supreme Court noted, "without the language excepting 'states' from the effect of the law, states, as well as local government powers, might well be construed to be preempted." 452 N.W.2d at 560, n.18. It follows, therefore, that because Congress did not authorize local governments to regulate pesticide use, they do not have that authority.[3]

B. *Congress Deliberately Chose Not to Exempt Local Regulation of Pesticides from Preemption in §136v.*

The absence of any reference to local regulatory authority in §136v is not accidental. As Respondents discuss in their brief, the legislative history of FIFRA demonstrates that Congress deliberately did not confer any regulatory authority over pesticides on localities because it did not want them to have any.

The original bill filed at the request of the Nixon Administration included a provision which would have expressly authorized local regulation of pesticide use. H.R. 4151, introduced

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[3] For the reasons set forth at length in Respondents' brief, the term "state" in §136v cannot be construed to include local governments as well.

Feb. 10, 1971, *quoted in Maryland Pest Control v. Montgomery County*, 646 F. Supp. at 111-112. The House Agricultural Committee deleted that provision and explained that the Committee had deliberately rejected it because "the 50 States and the Federal Government should provide an adequate number of regulatory jurisdictions." H.R. Rep. No. 511, *supra*, at 16. The bill went to the Senate Agriculture Committee which agreed with this change and specifically noted that it was intended to bar local regulation of pesticide use:

> Clearly, the fifty States and Federal Government provide sufficient jurisdictions to properly regulate pesticides. Moreover, few, if any, local authorities, whether towns, counties, villages, or municipalities, have the financial wherewithal to provide necessary expert regulation comparable with that provided by the State and Federal Governments. On that basis, and on the basis that permitting such regulation would be an extreme burden on interstate commerce, it is the intent that Section 24, by not providing any authority to political subdivisions and other local authorities of or in the States, should be understood as depriving such local authorities and political subdivisions of any an all jurisdiction and authority over pesticides and the regulation of pesticides.

Senate Agriculture and Forestry Committee, S. Rep. No. 838 at 4008.

The Senate Commerce Committee disagreed and proposed express language which would have authorized local regulation, S. Rep. No. 970, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. CODE & CONG. NEWS at 4111, but that language was deleted as a result of negotiations between the two Senate Committees. "Explanation of Compromise Substitute for the Text of H.R. 10729," 118 Cong. Rec. 32257-32258 (1972). The Senate and the House then enacted the language crafted and advocated by the Agriculture Committees.

In short, in the course of the legislative drafting process, Congress repeatedly considered and rejected language which would

have permitted local pesticide regulation. A statute should not be construed to achieve a result when Congress, considered and rejected specific proposed language which would have expressly accomplished that very result. "While we are correctly reluctant to draw inferences from the failure of Congress to act, it would, in this case, appear improper for us to give a reading to the Act that Congress considered and rejected." *Pacific Gas & Electric Co. v. State Energy Resources Commission*, 461 U.S. 190, 220 (1983). *Accord*, L. TRIBE, CONSTITUTIONAL CHOICES, *Congressional and Constitutional Silences*, p. 41 (1985) ("Congress' prior or contemporaneous rejection of proposed *amending language* or other legislation that would have enacted the very interpretation of a statute that a litigant later claims a statute *did* enact" indicates that the interpretation is wrong (emphasis in original)).

III. LOCAL REGULATION OF PESTICIDES WOULD DEFEAT THE CONGRESSIONAL PURPOSES OF FIFRA.

A. *Congress Intended Pesticide Regulation Decisions to Be Based on Thorough Consideration of Technical Evidence.*

The Petitioners contend that the declared intent of the Senate Agriculture Committee quoted above does not necessarily reflect the intent of Congress. However, the specific concerns expressed by the Agriculture Committee are entirely consistent with the fundamental overall approach that Congress took when it adopted FIFRA.

The Act requires detailed technical weighing of economic and environmental risks, costs and benefits of pesticides before a pesticide is registered for use and a similar cost-benefit analysis before a registered pesticide is banned. 7 U.S.C. §§136a, 136a-1, 136d. Congress instructs EPA to register an active ingredient if, after thorough consideration of all available scientific evidence, EPA finds that, among other things, the ingredient "will perform its intended function without unreasonable adverse effects on the environment; and . . . it will not generally cause unreasonable

adverse effects on the environment." §136a(c)(5)(C) and (D). In determining what data is needed to evaluate a pesticide, EPA must weigh complex environmental and economic factors. §§ 136a(c)(2), 136d(b). The Act contemplates a lengthy and expensive review process involving highly technical research and data. §136a (registration), §136a-1 (re-registration), §136d (suspension and cancellation). This technical analysis in the registration process is central to FIFRA's structure. It necessarily requires great technical expertise on the part of EPA as well as considerable amounts of time and money. *See, e.g.*, §136a-1 (re-registration process for a single pesticide can take several years; EPA empowered to charge re-registration fees of up to $150,000).

Congress intended that not only EPA but the states as well play their role with technical excellence. EPA is to approve a state applicator certification plan only if it contains "satisfactory assurances" that the state "agency has or will have . . qualified personnel necessary to carry out the plan" and that "the State will devote adequate funds to the administration of the plan." 7 U.S.C. §136i(a)(2)(B) and (C). Similarly, Congress instructed EPA to revoke the authority of a state to enforce pesticide use regulations if EPA determines that the state's program is inadequate. §136w-2.

The Petitioners claim that local ordinances are needed to protect public health because despite having spent millions of dollars and thousands of man-years of technical effort, EPA has completed its Congressionally-mandated examination of the costs and benefits of only a small fraction of the thousands of pesticides on the market. Petitioner's Brief at 63 - 68. If millions of dollars and thousands of man-years of research are indeed insufficient to resolve the complex environmental scientific and economic problems regarding pesticides in the thorough way that Congress wishes them resolved, then a town or village with little money and no expertise certainly will not be able to do the job.

B. *Experience Shows That Local Governments Are Generally Incapable of Making Such Complex Technical Decisions and That Their Attempts to Regulate Pesticides Would Frustrate FIFRA's Purposes.*

The Green Industry Council believes that if local governments were allowed to intrude into the field of pesticide regulation, then, rather than doing the job EPA has not been able to complete, in many instances, if not all, towns would substitute ignorance for intelligence, extremism for expertise, and panic for policy.

1. *Local Pesticides Regulation Could Harm the Environment.*

Uninformed and inconsistent local regulation of pesticides could damage the environment -- exactly what FIFRA is intended to prevent. This could happen in several ways. Most significantly, local regulations, by their sheer number and inconsistency as well as through the ignorance of those who promulgate them, could prevent introduction of new and safer pesticides and techniques of using them.

This risk is particularly significant for the developing techniques of "integrated pest management": an ecologically based approach to pest control which combines several different techniques to maintain pests below damaging levels. *See* EPA, INTEGRATED PEST MANAGEMENT OF TURF-GRASS AND ORNAMENTALS, (1989). Specific strategies of these evolving programs vary among crops and according to the seasons and weather but all have common components. Crops are monitored regularly to detect the level of infestation. The applicator must be ready to quickly and flexibly adapt the strategy to the latest conditions, taking into account the kind and quantity of the pests; the quantity of other creatures which are natural enemies of the pests; the stage of the crop; and the weather. Integrated pest management relies to a large extent on natural enemies of pests. Such enemies may be conserved by establishing a suitable habitat

and selecting and timing pest management techniques carefully, or they may be introduced from commercial sources. Other techniques of integrated pest management include reducing pests by "cultural controls" such as modifying planting, growing, and harvesting practices.

Integrated pest management strategies frequently include pesticides. The goal is to use the lowest effective amount of pesticides with the lowest toxicity to species other than the pests, including humans. This often requires using several different pesticides as conditions change through the year. The timing of the pesticide applications is crucial to provide the most effective control of the pests while minimizing impacts on natural predators.

In FIFRA, Congress has encouraged the use of integrated pest management by directing EPA to require that applicator certification programs make available instructional materials concerning integrated pest management. 7 U.S.C. §136i(c).

The keys to successful integrated pest management are variety, flexibility and timing. The user must be able to shift among several techniques, often including several different pesticides, depending on the conditions of the moment.

Multitudinous local regulations can frustrate this variety, flexibility and timing. The members of Amicus Green Industry Council, such as landscaping and lawn care firms, typically do business in dozens of local jurisdictions. In New England towns are small and numerous (351 in Massachusetts alone) and share authority with other local governments such as water districts and counties. If local pesticide regulations were allowed, green industry firms that want to abide by the law would face a labyrinth of hundreds of inconsistent regulations in hundreds of jurisdictions (some of them overlapping) administered by hundreds of obscure agencies. If a landscaping firm, for instance, discovers that a certain combination of pesticides is particularly effective under certain conditions, it would have to obtain approvals in each local jurisdiction for each pesticide. If the pesticide is new or otherwise unfamiliar to untrained local officials (and because there are thousands of pesticides, nearly all of them will be unfamiliar to

non-experts), the applicator firm will likely face long delays if not flat rejection.

Moreover, because local governments can devote only minimal resources to pesticide regulation, they often insist on early prior notification of each use of a pesticide in order to give themselves time to consider the proposed application. The members of Amicus Green Industry Council have encountered local ordinances and proposed ordinances that require pesticide applicators to file annual plans committing them up to a year in advance as to which pesticides they will use.[4] Such a requirement destroys any possibility of a flexible response to a sudden infestation or to unexpected weather. If the applicator were to attempt to prepare for such eventualities by listing in the annual plan every pesticide he might conceivably use, he would have to undergo local approval proceedings for each such pesticide in every local jurisdiction in which he does business.[5] Rather than invest time in endless local legal proceedings, the applicator may be forced to abandon integrated pest management and instead use a more familiar

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[4] For instance, the Town of Wellesley requires that, "Every applicator shall annually provide the Health Department a listing of all pesticides being used or planned for use within the Town. This list shall be supplemented by a copy of a material safety data sheet, a copy of the pesticide label, and the EPA fact sheet for the product. . . . Every applicator of pesticides must annually provide the Health Department with the registration classification of any pesticide to be applied within the Town of Wellesley." Copies of this ordinance and the other local ordinances cited in the notes below are on file with counsel for Amicus Green Industry Council.

[5] The Town of Leicester, Massachusetts, has recently demanded that at least one golf course submit a "Chemical Management Plan" which "utilizes integrated pest management techniques" and "shall contain provisions for unanticipated contingencies, and shall list all chemicals to be used or stored . . . and . . . shall also show proposed areas of application, proposed application schedule and proposed method of application and storage." The Town does not explain how businesses are supposed to anticipate "unanticipated contingencies." While Leicester has not enacted this demand as an ordinance, it could do so, as could any town, if local pesticide regulation is not preempted.

pesticide in whatever greater quantities are needed to kill the pests.

In addition to interfering with new and environmentally beneficial techniques, local governments, through ignorance, may force the use of relatively more hazardous pesticides by banning or restricting safer ones or may require that pesticides be used in inappropriate ways.

2. *Local Pesticide Regulations Would Interfere with Interstate Commerce.*

The experience of Amicus Green Industry Council and its members has also shown that local regulations threaten to interfere with interstate commerce. The Senate Agricultural Committee specifically noted this problem in discussing its reasons for drafting §136v in the form that was ultimately enacted. S. Rep. No. 838, *supra* at 4008. Congress also addressed this concern when it totally banned not only local but state regulation of pesticide labeling requirements. §136v(b).

Allowing thousands of local governments to promulgate inconsistent ordinances would interfere with interstate commerce. This is most clearly seen in local regulations regarding transportion of pesticides. A truck carrying pesticides down an interstate highway may pass through dozens of towns. If each town could impose different and inconsistent requirements on the construction, color and safety equipment of the truck, commerce in pesticides would grind to a halt. Even if each town could merely require a license and fee for transporting pesticides, the cumulative effect of dozens or hundreds of license fees would put transportor and applicator firms out of business, which certainly would interfere with interstate commerce.

Furthermore, different towns could take entirely different approaches to regulating pesticide use, requiring firms to modify their practices in various inconsistent ways and provide different information about the pesticides and their use. One town might

insist on registering the applicator company;[6] another would require registration of pesticides, demanding data over and above that required for federal and state registration;[7] a third might regulate the size and color of signs posted at application sites;[8] a fourth might set standards for loading of pesticides into trucks;[9] and a fifth might try to regulate every truck that transports pesticides through the community.[10]

In short, allowing local regulation of pesticide use would frustrate Congress' purposes in FIFRA to have pesticide regulations which are rationally justified on the best available technical

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[6] For instance, the Town of Wellesley Massachusetts requires that "All pesticide applicators operating in the Town of Wellesley must register with the Wellesley Health Department."

[7] In 1983 the City of Haverhill, Massachusetts adopted an ordinance requiring that

> Any Public Utility desiring to use . . . herbicides must submit to the Board of Health an application for approval . . . which shall have with it evidence to establish that the said use will not create any public health hazard . . . . Said evidence shall consist of tests made of the proposed herbicides by a laboratory certified by the Environmental Protection Agency as being qualified and competent to determine whether the proposed use of such herbicide or its breakdown products will or will not create the said public health hazards. Among the sumbitted [sic] tests shall be bacterial tests such as the Ames Salmonella Test for mutagenicity and also tests of chronic exposure of one or more varieties of laboratory animals.

[8] The Town of Mansfield, Massachusetts requires that signs marking sites where pesticides are used on turf must be pink, despite the requirement of the Commonwealth of Massachusetts that persons applying pesticides to turf post yellow signs, 333 Code of Mass. Regs. 10.03(30).

[9] The Town of Mashpee, Massachusetts requires that users of pesticide trucks submit a "description of the manner whereby tank vehicle is to acquire water . . . ."

[10] The Town of Mansfield, Massachusetts commands that "All service vehicles must carry storm drain protective covers and one hundred (100) pounds of granular absorbent."

examination of risks, costs and benefits; to protect the environment and encourage safer pest management techniques; and to prevent interference with interstate commerce.

IV. CONCLUSION

The judgment of the Supreme Court of Wisconsin should be affirmed.

DATED: Boston, Massachusetts: March 28, 1991.

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